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3 UNITED STATES DISTRICT COURT  
4 DISTRICT OF NEVADA  
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6 MARVIN D. RICHARD,  
7 Petitioner,  
8 v.

9 JOE GENTRY, *et al.*,  
10 Respondents.  
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Case No. 2:18-cv-00181-KJD-NJK

**ORDER**

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13 In this habeas corpus action, the petitioner, Marvin D. Richard, represented by  
14 appointed counsel, filed a second amended petition for writ of habeas corpus on  
15 October 4, 2018 (ECF No. 18). Respondents were to respond to the second amended  
16 petition by March 18, 2019. See Order entered January 31, 2019 (ECF No. 28).

17 On March 15, 2019, Richard filed a motion for leave to file a third amended  
18 petition (ECF No. 29). Respondents filed an opposition to that motion on April 5, 2019  
19 (ECF No. 47). Richard replied on April 12, 2019 (ECF No. 49).

20 On March 15, 2019, Richard also filed a motion for leave to file an exhibit under  
21 seal (ECF No. 30). Respondents did not respond to that motion.

22 On March 18, 2019, Respondents filed a motion to dismiss (ECF No. 32),  
23 responding to Richard's second amended petition. Richard has not yet responded to  
24 that motion to dismiss; his response would be due May 17, 2019. See Order entered  
25 March 29, 2018 (ECF No. 14).

26 In his motion for leave to amend, Richard seeks leave of court to file a third  
27 amended habeas petition adding factual detail to one of his claims – a claim that, in  
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1 their motion to dismiss, Respondents argue is unexhausted in state court. Richard has  
2 attached to his motion a copy of the proposed third amended petition (ECF No. 29-1).

3 Under Federal Rule of Civil Procedure 15(a)(2), a party may amend a pleading,  
4 beyond an initial amendment, with leave of court. "The court should freely give leave  
5 when justice so requires." Fed. R. Civ. P. 15(a)(2). Rule 15 reflects a policy of favoring  
6 amendments to pleadings, and courts should apply that policy liberally. *United States v.*  
7 *Webb*, 655 F.2d 977, 979 (9th Cir. 1981). In deciding whether to grant leave of court to  
8 amend, a court may consider: any bad faith, undue delay, or previous amendments on  
9 the part of the petitioner; any potential prejudice to the opposing party; and the potential  
10 futility of the amended pleading. *In re Morris*, 363 F.3d 891, 894 (9th Cir. 2004); see  
11 also *Foman v. Davis*, 371 U.S. 178, 182 (1962).

12 There is no indication of bad faith or undue delay with respect to Richard's  
13 motion to amend. While Richard has twice previously amended his petition, he has  
14 shown that there is reason for him to amend a third time, to include in his petition the  
15 newly developed further evidentiary basis for a claim. There is no showing of any unfair  
16 prejudice to the respondents if the amendment is allowed. Contrary to Respondents'  
17 argument, the Court determines that the requested amendment will not necessarily be  
18 futile. The Court finds that the question of the exhaustion of the subject claim will be  
19 better addressed in the context of a motion to dismiss than on this motion for leave to  
20 amend. In short, the Court finds that, in the interests of justice, leave to amend is  
21 warranted. The Court will grant Richard's leave to amend, will direct the Clerk to  
22 separately file the third amended petition, and will set a schedule for Respondents'  
23 response to the third amended petition.

24 The filing of the third amended petition will render moot the motion to dismiss the  
25 second amended petition, and the motion to dismiss the second amended petition will,  
26 therefore, be denied, without prejudice, on that ground. Respondents will be granted  
27 time to respond to Richard's third amended petition. That response may be a motion to  
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1 dismiss asserting any or all the arguments asserted in the motion to dismiss the second  
2 amended petition.

3 Turning to Richard's motion for leave to file an exhibit under seal, Richard  
4 requests, in that motion, leave of court to file under seal, as Exhibit 37, a copy of a  
5 supplement to a psychological evaluation regarding himself. There is a strong  
6 presumption in favor of public access to judicial filings and documents. *See Nixon v.*  
7 *Warner Communication, Inc.*, 435 U.S. 589, 597 (1978); *see also Kamakana v. City and*  
8 *County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006); *Foltz v. State Farm Mut. Auto*  
9 *Ins. Co.*, 331 F.3d 1122, 1134 (9th Cir. 2003). However, the court has inherent power  
10 over its own records and files, and access may be denied where the court determines  
11 that the documents may be used for "improper purposes." *See Nixon*, 435 U.S. at 598;  
12 *Kamakana*, 447 F.3d at 1179; *Hagestad v. Tragesser*, 49 F.3d 1430, 1433-34 (9th Cir.  
13 1995). Richard asserts in his motion that the supplement to the psychological  
14 assessment should be filed under seal to protect his privacy, and out of respect for the  
15 state courts, which held the original evaluation under seal in his state post-conviction  
16 proceedings. The Court finds that there is good cause for Exhibit 37 to be filed under  
17 seal.

18 **IT IS THEREFORE ORDERED** that Petitioner's Motion for Leave to File Third  
19 Amended Petition (ECF No. 29) is **GRANTED**. The Clerk of the Court is directed to  
20 separately file the Third Amended Petition for a Writ of Habeas Corpus, which is  
21 attached to the motion at ECF No. 29-1.

22 **IT IS FURTHER ORDERED** that Respondents will have **30 days** from the date of  
23 entry of this order to respond to Petitioner's third amended habeas petition. In all other  
24 respects, the schedule for further proceedings set forth in the order entered on  
25 March 29, 2018 (ECF No. 14) will remain in effect.

26 **IT IS FURTHER ORDERED** that Respondents' Motion to Dismiss (ECF No. 32)  
27 is **DENIED**, without prejudice, as moot.  
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1           **IT IS FURTHER ORDERED** that petitioner's Motion for Leave to File Exhibits  
2 Under Seal (ECF No. 30) is **GRANTED**. Petitioner is granted leave of court to file  
3 Exhibit 37 under seal. As that exhibit has already been filed under seal (ECF No. 31),  
4 no further action is necessary in this regard.

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6           DATED THIS 22 day of April, 2019.

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KENT J. DAWSON,  
UNITED STATES DISTRICT JUDGE